United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1210

Original

P/S

Docket No. 76-1210

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

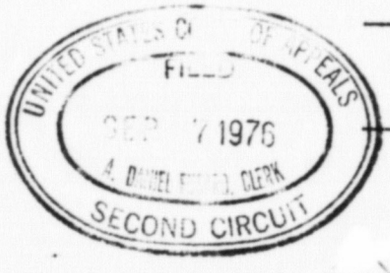
Plaintiff- Appellee,

- against -

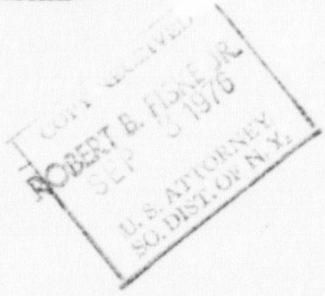
ALFRED TAYLOR, WILLIAM TURNER, RUFUS WESLEY, AL GREEN, HENRY SALLEY, CHARLES RAMSEY,

Defendant-Appellants.

On appeal from the United States District Court
for the Southern District of New York



BRIEF FOR APPELLANT AL GREEN



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UNITED STATES OF AMERICA,

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Defendants-Appellants.

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This is an appeal from the judgment of conviction of the defendant, Al Green, wherein he was found guilty after jury trial before the Honorable Judge Kevin T. Duffy, of Counts One and Eight

[Title 21, United States Code, Sections 173, 174, 812, 841(a)(1), 841 (b)(1)(A)] of Indictment S 75 Cr. 1112. The defendant was indicted with sixteen others and tried with twelve others, after one defendant, Warren Robinson, was severed during jury selection.

After conviction on April 2, 1976, defendant Green was sentenced to imprisonment for a period of eight years on each count, namely one and eight, which sentences were to run concurrently, and placed on special parole for a term of three years, to commence upon the expiration of confinement.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Should this indictment be dismissed, in that the Government attempted to obtain, in a single trial, convictions of numerous defendants, who, at best, were only loosely connected in a criminal enterprise?

(2) Should the indictment be dismissed in that the indictment charged one conspiracy, but the proof showed more than one conspiracy, such as to affect the substantial rights of the accused?

(3) Did the trial Court err in failing to charge the jury,

although it had previously granted the application of the defendant, Al Green, as to his request to charge (charges two and three)?

(4) Did the trial Court err in allowing the attorney for the said Warren Robinson, Ivan Fisher, Esq., to participate in jury selection from January 29, 1976 until he was severed on February 4, 1976?

(5) Did the trial Court err in not advising defense counsel as to the reason juror number three wished the trial to be pursued to a rapid conclusion, and not advising trial counsel as to the notes sent to the Court by the juror?

(6) Did the trial Court err in ruling that the identification in open court of Al Green by witness Harry Pannirello was not tainted by photographs shown the witness prior to trial? Did the trial Court also err in allowing an in-court identification of the defendant, Al Green, by Pannirello after the United States attorney had indicated in open court that Pannirello had said that he did not see Al Green in open court.

(7) Did the trial Court err in not granting a mistrial when the witness Pannirello, despite the instruction of the Court, testified that he heard on the radio, "That there was a big bust..."

in connection with a meeting with Al Green? (See trial minutes, p.2128)

(8) Did the introduction of lactose into the trial, (see trial minutes, pp.675-793) during the presentation of testimony against Walter John Smith and the introduction of heroin, which was found in the apartment of Basil Hansen (see App. JA 414- 418, min. pp.2573-86), constitute inflammatory material which was highly prejudicial to the defendant, Al Green, and constitute error?

STATEMENT OF THE CASE

The defendant, Al Green, was originally indicted in the case of United States of America v. Carmine Tramunti, 73 Cr. 931. This was, of course, a multi-defendant case of some repute, the names of the defendants of that trial having permeated the present trial. The only defendants in the Tramunti case to be tried with Al Green in this case were defendant Henry Salley, who was granted a new trial after appeal; Warren Robinson, who was tried and convicted in the Tramunti case and eventually severed in this case; John Doe, a/k/a "Folk" and John Doe, a/k/a "Basil". Green went to trial in the Tramunti case, but after a few weeks of that trial, he sustained a fractured skull in an accident and was severed during trial by

Judge Duffy.

In the case at hand, which commenced January 26, 1976, not one word of testimony was adduced against the defendant, Al Green, until the witness Harry Pannirello took the stand on March 2, 1976 (see trial minutes, p. 1943).

Prior to the time of Pannirello's taking the stand, substantially all the major witnesses who testified at the Tramunti trial, namely Dawson, March and Ellis, testified against the defendants Warren Robinson, Al Taylor, Bryant Ferguson, Charles Ramsey, Rufus Wesley, Walter John Smith, Cecil Tate, Henry Salley, Basil Hansen, Ernestine Barber and Arhelia Miller. In substance, this testimony concerned itself with the alleged purchase and sale of drugs. On January 29, 1976, three days after the trial began, counsel for Warren Robinson indicated to the Court that it was his intention to open to the jury and advise them that Robinson was guilty of "the conspiracy alleged in this case". Mr. Fisher said:

> *MR. FISHER: I should add in support of the respective motions, your Honor, and this may enlighten all parties, my intention is to open to the jury stating that Mr. Robinson has, in fact, been convicted for the conspiracy alleged in this case and that he does not deny, he does not deny narcotics trafficking with Mr. Dawson, Mr. March, Mr.*

Provitera, Mr. Pannirello and Miss Ellis. [See App. JA 507, trial minutes, p. 29]

Because of the obvious difficulties this would cause in prejudicing most of the defendants, the Court, on the motion of the defendant Robinson, severed him entirely from the trial. Prior to that time, the Court had, on motion of Robinson's attorney, bifurcated Count Two, which alleged violation of Title 21, United States Code, Section 848, from Count One, the conspiracy count, Sections 846, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code. As was indicated, however, because of the prejudice involved, Robinson was totally severed on February 4, 1976, but only after his counsel, Ivan Fisher, who was also lead counsel, had participated in jury selection with the other defendants' attorneys. The other attorneys had also requested severance of Robinson when it was originally determined what his position before trial was. One of the ground rules of this case, as outlined by Judge Duffy, was that motion by one lawyer was deemed motion by all.

All of the defendants, with the exception of Al Green and Basil Hansen, were from the Washington, D.C. area and most of the testimony concerned itself with alleged buying and selling of narcotics in the Washington area. The name of Warren Robinson

centered as the lead figure in the enterprise and Mr. Robinson was admitted by the United States attorney to be one of the central figures of this case. Mr. Engel indicated:

> One dispute is between the government and Mr. Robinson, wherein the government alleges basically that he was the manager of much of the enterprise charged in the indictment, but there is no dispute as to him, and it's conceded, no dispute as to his participation in the conspiracy. [See App. JA 510, trial minutes, p. 90]

Robinson, of course, was not present at the trial, having been severed by Judge Duffy. Testimony was taken from many witnesses, none of which was against Al Green, but most of which was against the Washington defendants and their alleged conspiracy.

On March 2nd, when Harold Pannirello took the stand, the name of Al Green was first mentioned in this trial. Pannirello testified that he started dealing in drugs in 1970, when he sought out Frank Pugliese in the Bronx. Pugliese was a defendant in the Tramunti case, as was his brother, Carmine Pugliese. Pugliese then took Pannirello to 1380 University Avenue in the Bronx, some time in March or April of 1970, although the date is obscure in Pannirello's mind, as are most of the dates and times when he alleged he dealt with Al Green. Pannirello testified that he was introduced to Hattie Ware,

who was convicted in the Tramunti trial, at 1380 University Avenue in the Bronx and also to Basil Hansen, and that a sale of narcotics was made to Basil Hansen and Hattie Ware. He further testified that he was introduced by "Butch" Frank Pugliese to Al Green at the same address at about the same time. Subsequently, he testified that he made sales to Al Green on at least five occasions and possibly ten or fifteen occasions. The dates and even the number of times were very vague, as was indicated by the cross-examination of the witness:

> Q Prior to that ime, you indicated that you had met Al Green on ten or fifteen occasions; is that correct?
> A Approximately.
> Q Could it have been less than ten?
> A It could have been.
> Q Could it have been five?
> A It could have been twenty.
> Q Could it have been an approximate number, but you don't have the vaguest notion?
> A Not an approximate number. [See trial minutes, p. 1990]

Mr. Pannirello identified the defendant, Al Green, in open court after a preliminary hearing before the Court alone to determine whether Pannirello's identification was tainted by having shown mug shots of Al Green.

Thereafter, he testified as to the Pugliese operation that Pugliese was partners with one Pat Delacio (a Tramunti defendant) and how Frank Pugliese went to jail in September of 1971, after ar-

ranging for Pannirello to take over the drug business. He further testified as to his dealings with Mr. Pugliese and Tennessee Dawson, who was the original witness against all of the Washington defendants. Thereafter, further testimony was elicited from Pannirello as to his dealings with Springer and "Paulie" and with John Barnaba, all three of whom were connected to Tramunti. Information as to Pugliese's going to jail and further dealings with Tennessee Dawson and Warren Robinson were inquired into by the Government on direct examination. The name of John Gambia and his relationship to Pannirello became part of the direct testimony (Gambia was also a Tramunti defendant), as did Pannirello's dealings with Rufus Wesley, a defendant in the present case. Pannirello further testified that he purchased goods from Joseph DiNapoli, who figured heavily in the Tramunti trial and who was a defendant and convicted in that trial.

He further stated that he brought his brother-in-law, James Provitera, into his drug business and that he introduced Provitera to Al Green.

The rest of Pannirello's testimony concerned itself with his meetings with Warren Robinson in February or March of 1972 and of his numerous drug dealings with him; with dealings with James March, a/k/a "Bubbles", who also testified for the Government in

this present case, and his dealings with Arhelia Miller.

Pannirello further testified that he was supposed to meet Al Green at Yankee Stadium in the spring of 1972, but that Al Green did not show up and that after that occasion, he did not see or have any further dealings with Green. He prefaced this recitation as to the meeting in Yankee Stadium by indicating before the jury "That there was a big bust", despite a prior admonition of the Court that he not tell the jury what he heard on the radio. This led to Al Green's motion for a mistrial.

Aside from Pannirello's testimony as to his dealings with Green, the only other testimony came from Pannirello's brother-in-law, James Provitera. He indicated he went to Al Green's apartment on one occasion with Harry Pannirello, who went into the bedroom with Green, where Pannirello implied that a narcotics transaction occurred. However, Provitera could not identify Green in open court. He further testified that he was present on another occasion when a package of narcotics was given to Hattie Ware with instructions to give the same to Al Green. Further testimony of Provitera indicated that he and Pannirello waited at Yankee Stadium for Al Green, but that Green never appeared. The completion of his testimony

concerned his dealings with Warren Robinson and others from Washington.

ARGUMENT

POINT ONE

THIS INDICTMENT SHOULD BE DISMISSED IN THAT THE GOVERNMENT ATTEMPTED TO OBTAIN, IN A SINGLE TRIAL, CONVICTIONS OF NUMEROUS DEFENDANTS, WHO, AT BEST, WERE ONLY LOOSELY CONNECTED IN A CRIMINAL ENTERPRISE.

THE INDICTMENT SHOULD BE DISMISSED IN THAT IT CHARGED ONE CONSPIRACY, BUT THE PROOF SHOWED MORE THAN ONE CONSPIRACY, SUCH AS TO AFFECT THE SUBSTANTIAL RIGHTS OF THE ACCUSED.

(For the purpose of this argument, issues one and two will be considered together.)

It is the position of this appeal that the present case before the Court concerns itself with a continuation and an extension of the case of United States v. Tramunti, 513 F.2d 1087. This was obvious from its inception to the trial Court, the prosecutors and defense counsel. Judge Duffy, at the inception of the case, stated after the excusal of a juror who walked into the robing room during the discussion of the Tramunti case between himself and certain trial

counsel:

> THE COURT: Unfortunately the juror walked in while we were having a conversation about the last trial. Basically what was being referred to was the Tramunti trial and I don't want that trial to slop over into this one. [See App. JA 506, trial minutes, p.8]

The minutes are replete with this admonition, but unfortunately, it was, from a pragmatic point of view, a fatality from its inception, both to the prosecution and the defense.

Applicable to this case is the comment of Judge Friendly in United States v. Miley, 513 F.2d 1207, when he stated, "we must again deal with the consequences of the Government's ill-advised practice of attempting to obtain in a single trial convictions of numerous defendants who are only loosely connected in a criminal enterprise."

Al Green, the defendant in this case, was originally a defendant in the case of United States v. Tramunti, 513 F.2d 1087. In the appendix of the present appeal appears Indictment Number S73 Cr.931, which was superceded by Indictment Number 73 Cr.1099, which was filed on December 6, 1973 and which charged fifteen appellants and seventeen other defendants in thirty counts. Count One charged fifteen appellants in the Tramunti case and seventeen other defendants with attempting to violate the Federal narcotics laws, from

January 1, 1969 until December 6, 1973. There also appears in the appendix of the present appeal, this case's superceding indictment, together with the bills of particulars in both cases.[1] In each case, Green was indicted in two counts, one for conspiracy and one substantive count. The fact pattern, as previously outlined, was at best confusing, as it must necessarily be in multiple defendant cases and yet, it was only a summary of the testimony of Pannirello and Provitera. It did not include all of the testimony of the other witnesses besides Pannirello and Provitera, who testified as to the Washington co-defendants. For a correlation as to the identity of testimony in both the present case and the Tramunti case, see the extensive fact pattern outlined by the Court in its opinion in United States v. Tramunti, supra.

Green proceeded to trial in Tramunti, but during the trial, he was severed after he received a skull fracture in an accident. The Circuit Court of Appeals' opinion refers to Green as the late Al Green, but in fact, Green did not die, but recovered and of his own volition called the Court to advise that he was recovered and could return to trial. He was advised that his case had been severed.

As the Court in United States v. Bertolotti, 529 F.2d

[1] App. JA 473- JA 505

149, referred itself to the words of Judge Timbers, who stated in the Sperling case, 506 F.2d 1340-1 (2d Cir., 1974):

> ...we take this occasion to caution the government with respect to future prosecutions that it may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case. It has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top.

The case of Al Green is exactly in point. After his severance in the Tramunti trial, the Government sought to try him again and in doing so, sought and obtained an indictment and placed Al Green in the present case, which I shall refer to as the Warren Robinson case. The Robinson case, of itself, is concerned with at least two separate conspiracies, one dealing with Warren Robinson and those persons from Washington, D.C. who were associated with him, and one dealing with those persons in the New York area. None of the persons in Washington knew Al Green, and in fact, not one word of testimony appeared in the trial from January 29, 1976 until March 2, 1976, when Pannirello testified as to his alleged dealings with Al Green. The testimony for almost five weeks in substance concerned itself with all those persons allegedly connected to Warren Robinson,

namely, Al Taylor, William Turner, Bryant Ferguson, Charles Ramsey, Walter John Smith, Cecil Tate, Henry Salley, Ernestine Barber and Arhelia Miller, and this through the testimony of James March, Dorothea Ellis and Temessee Dawson.

As a matter of logic, for the Government to sustain the present indictment, it would have to argue that the Tramunti case and the present case concern themselves with one conspiracy.

In United States v. Bertolotti, 529 F.2d, 154, the Circuit Court rebelled against this type of logic. The Court stated:

> *When convictions have been obtained on the theory that all defendants were members of a single conspiracy although, in fact, the proof disclosed multiple conspiracies, the error of variance has been committed. Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). See Note, Federal Treatment of Multiple Conspiracies, 57 Colum.L. Rev. 387, 396 (1957).*

The Court in Bertolotti stated that

> *This Circuit has gone quite far in finding single conspiracies in narcotics cases. See United States v. Tramunti, 513 F.2d 1087 (2d Cir. 1975), cert. denied, --- U.S. ---, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975); United States v. Sperling, supra; United States v. Mallah, 503 F.2d 971 (2d Cir. 1974), cert. denied, 420 U.S. 995, 95 S. Ct. 1425, 43 L. Ed.2d 671 (1975); United States v. Bynum, 485 F.2d 490 (2d Cir. 1973), vacated and remanded on other grounds, 417 U.S. 903, 94 S.Ct. 2598, 41 L.Ed.2d 209 (1974); United States v. Agueci, supra. Despite the existence of multiple groups within an alleged conspiracy, we have considered them as part of one integrated loose-knit combination in instances where there*

existed "mutual dependence and assistance" among the spheres, United States v. Tramunti, supra, a common aim or purpose among the participants, United States v. Agueci, supra, or a permissible inference. from the nature and scope of the operation, that each actor was aware of his part in a larger organization where others performed similar roles equally important to the success of the venture, United States v. Sperling, supra; United States v. Bynum, supra. The common thread running through these cases is our treatment of them as general, albeit illegal, business ventures. United States v. Mallah, supra, at 976. Each involved traditional modus operandi with middlemen purchasing narcotics for sale to a series of customers. See United States v. Agueci, supra.

The opinion in essence would indicate that the Court had gone about as far as it would go in Tramunti on the single conspiracy theory. For the Court to sustain this present conviction, it would appear that the Court would have to state that in addition to all of the characters that were mentioned in the Tramunti trial, there now can be added all of the Washington defendants and their various enterprises, coupled with the seventy or more co-conspirators.

The difficulty in multiple conspiracy cases, of course, is the question of whether a defendant can receive a fair trial when, together with the facts of his own case, a jury is presented with facts concerning illegal activities of over one hundred different individuals. No wonder in the present case the jury spent almost five days in deliberation. As the record will show, the jury asked for testimony,

both direct and cross-examination, as to each and every defendant. This amounted to the jury rehearing the entire case, but from the court reporters' mouths and not from the witnesses' mouths. Obviously, the Government realizes that it is difficult not to be swept along into multiple convictions, when one is a member of a multiple conspiracy indictment. This policy, resulting in convictions, will continue until the Government stops prosecuting multiple conspiracy cases. As this memorandum is being written, there is presently before Judge Owen, in the Southern District, a case concerning over thirty-three defendants.

Al Green, in the present trial, as has been indicated, had testimony against him by one witness, Harry Pannirello. Pannirello's testimony is that he made a sale to Al Green on about ten occasions. However, on cross-examination, Pannirello was imprecise as to the number of times, or for that matter, as to the quantities sold to Al Green.

> *Q In answer to Mr. Engel's question, you indicated that you had transactions with Al Green ten or 15 times, is that correct?*
>
> *A Somewhere around there.*
>
> *Q You are not really certain of that either, are you?*
>
> *A No.*
>
> *Q You remember me asking you last week if you were certain, you would have said the same thing? You remember me asking you that?*
>
> *A Yes.*
>
> *Q Do you remember me asking you could it have*

been less than ten times and do you remember saying it could have been?

A Yes.

Q Do you remember me asking you could it have been less than five times? Do you remember my asking you that?

MR. ENGEL: Could we have the transcript page and the question itself?

MR. SCHWARTZ: I will read it.

Just bear with me a few minutes.

(Pause)

Q Page 1990, line 8:

"Q Prior to that time you indicated that you met Al Green on ten or 15 occasions, is that correct?

"A Approximately.

"Q Could it have been less than ten?

"A It could have been.

"Q Could it have been five?

"A It could have been 20."

Do you remember me asking you that?

A Yes.

Q So then in actuality you really don't know how many times you met Al Green, do you?

A Not the exact count, no. [See trial minutes, pp. 2354-55]

Q During the fall of 1971 how many times, if you can recall, did you see Al Green during that period?

A I can't recall offhand. [See trial minutes, p. 2084]

Q How much did you give to Al Green; do you recall?

A From the two kilos?

Q Yes.

A 3/4 of a kilo, half a kilo. [See trial minutes, p. 2087]

Q Were you paid by Al Green at that time?

A Yes.
Q How much were you paid?
A Either $7,000 or $14,000 or--
MR. SCHWARTZ: I object to that, your Honor.
THE COURT: Yes. There is a big difference.
A I don't remember the exact amount of goods that I gave him.
THE COURT: Okay. [See trial minutes, pp. 2087-88]

The testimony of Pannirello as to his dealings with Green was almost identical to the testimony elicited at the Tramunti trial, as an examination of the minutes of Tramunti will reveal, although Green was not present at the Tramunti trial at that time, with an opportunity to cross-examine Pannirello, because he had already been severed.

Furthermore, it is the contention of Al Green, that the Government's proof in this case, together with the cross-examination of Harold Pannirello, is that, if anything, Green had only incidental contacts with some of the conspirators and that therefore the evidence was insufficient. [See United States v. Buffalino, 285 F.2d 408, 417-18 (2d Cir. 1960)] At best the record would indicate that Green was a casual facilitator [United States v. Jones, 308 F.2d 265 (2d Cir. 1962)].

In addition, it is to be argued that the testimony of itself elicited against Green does not create any inference of knowledge of

the broader conspiracy, even if it was to be considered that there was one conspiracy. See United States v. D'Amato, 493 F.2d 365, United States v. DeNoia, 451 F.2d 979, 981 (2d Cir. 1971).

As has been determined in United States v. Miley, 513 F.2d 1191 (1975), Sections 21-25:

> *Where the indictment charges one conspiracy but the proof shows more than one, a variance is not necessarily fatal. "The true inquiry...is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." Berger v. United States, 295 U.S. 78, 82, 55 S.Ct. 629, 630, 79 L.Ed. 1314 (1935). See United States v. Aqueci, supra, 310 F.2d at 827; United States v. Vega, 458 F.2d 1234, 1236 (2 Cir. 1972), cert. denied sub nom. Guridi v. United States, 410 U.S. 982, 93 S.Ct. 1506, 36 L.Ed. 2d 177 (1973); United States v. Calabro, 467 F.2d 973, 983 (2 Cir. 1972), cert. denied, 410 U.S. 926, 93 S.Ct. 1357, 35 L.Ed.2d 587 (1973), reh. denied, 411 U.S. 941, 93 S.Ct. 1891, 36 L.Ed.2d 404 (1973); Fed.R.Crim.P. 52(a); 8A Moore, Federal Practice Par. 52.03[2], at 52-12 (1975).*

In Miley, furthermore, the Court discusses spill-over and says, on page 1209:

> *The only remaining claim of prejudice is that the trial of one set of conspirators had a spill-over effect on the others, an effect which could have been avoided in separate trials. However, this was not a case where a minor participant in one conspiracy was forced to sit through weeks of damaging evidence relating to another. The whole trial consumed but five days and the crimes of the various appellants were not markedly different. Nor do we have a case in which, for instance, 36 persons in*

eight separate conspiracies were prosecuted in a trial in which one defendant could be swept along with the others, where "[t]he dangers of transference of guilt from one to another across the line separating conspiracies, subconscious or otherwise, are so great that no one really can say prejudice to substantial right has not taken place." Kotteakos v. United States, 328 U.S. 750, 774, 66 S.Ct. 1239, 1252, 90 L.Ed. 1557 (1946).

In the case at hand, this is exactly what did occur, as far as Green is concerned. Conversely, all of the Washington defendants were forced to hear testimony concerning Green. When Judge Duffy instructed that he did not want Tramunti to spill over into this case, it was tantamount to saying that the word "Tramunti" should not be used. But there were references by counsel to the effect of "Do you recall being asked certain questions in other proceedings?" and, of course, the names of defendants and co-conspirators in the Tramunti case were allowed. See Pannirello's testimony, for example, where the names of John Barnaba, Frank Pugliese, Carmine Pugliese, "Sinatra" and Pat Delacio were allowed into the record over objections. The fear of the Court in United States v. Miley did occur here. Defendants were "swept along with the others" and there was transference of guilt from one to another across the lines separating the Tramunti conspiracy and the Washington conspiracy.

In United States v. La Vecchia, Judge Mulligan, in his concurring opinion, said on page 1221:

> *...this court has recently said on two separate occasions involving drug conspiracies that it has become all too common for the Government to bring indictments against numerous defendants on the claim of a single conspiracy when the criminal acts could more reasonably and sensibly be regarded as two or more conspiracies. See United States v. Miley, 513 F.2d 1207, United States v. Sperling, 506 F.2d 1340-4*

Furthermore, it is respectfully submitted that if there were multiple conspiracies, the Court must also reverse Green's conviction under the substantive count (United States v. Aloi, 511 F.2d 585 1975, United States v. Cantone, 426 F.2d 902 (2d Cir.) cert. denied 400 U.S. 822 91 S.Ct. 55).

Moreover, in this case, by no stretch of the imagination could the group in Washington be in any way associated with the group in New York. There was no co-mingling of assets, common headquarters or any mutual dependency of the two groups to permit them to be linked together as a single operation [see United States v. Mallah, 503 F.2d 971-976 (2d Cir. 1974)].

Although the indictment in this case charged one overall conspiracy, the proof showed a series of smaller ones, namely, the entire Warren Robinson operation, which was independent and without a link to the Tramunti case; further, testimony was allowed

into the record as to the sale of lactose between Roger's Surgical Supply Company (owned by the defendant Walter John Smith) and Warren Robinson, and finally, testimony of heroin found in the apartment of Basil Hansen, which could in no way be linked to Al Green. (See Point VII, as to the introduction of this evidence into the record.) This material variance prejudiced the defendant, Al Green, and did not allow him to have a fair trial. (See Berger v. United States, 295 U.S. at 82, 55 S.Ct. 629.)

As was said in Bertolotti, 529 F.2d 157:

> Under the guise of its single conspiracy theory, the Government subjected each of the seven appellants to voluminous testimony relating to unconnected crimes in which he took no part.

As was further stated in that case, at 157:

> Criminal they [the defendants] may have been, but their guilt did not permit violation of their "right to be tried en masse for the conglomeration of distinct and separate offenses committed by others." Kotteakos v. United States, supra, 328 U.S. at 775, 66 S.Ct. at 1253.

POINT II

THE TRIAL COURT ERRED IN FAILING TO CHARGE THE JURY, ALTHOUGH IT HAD PREVIOUSLY GRANTED THE APPLICATION OF THE DEFENDANT, AL GREEN, AS TO HIS REQUEST TO CHARGE (CHARGES TWO AND THREE).

Al Green requested a charge of the Judge and that

charge was as follows:

> *That the only direct testimony in this trial against the defendant, AL GREEN, accusing him of the purchase of drugs was provided by Harry Pannirello and James (Jimmy) Provitera, although James Provitera failed to identify AL GREEN in open court.*
>
> *That both Harry Pannirello and James Provitera are considered to be accomplices in the alleged conspiracy. That I charge you that you must carefully scrutinize accomplice testimony and consider it with caution.*
>
> *If after careful consideration you find the defendant, AL GREEN, was not proven guilty beyond a reasonable doubt by the Government through the testimony of either or both Harry Pannirello and James (Jimmy) Provitera, after applying the rules of the presumption of innocence as presented to you by the Court, I charge you that you must acquit the defendant, AL GREEN, on all counts of the indictment. [See App. JA 564]*

The Court stated, "Requests nos. 2 and 3 will be given in my language." (see App. JA563) and then in its charge, it is the contention of the defendant, that the Court failed to charge as to charge three. The Court did charge as to the dangers of accomplice testimony, but did not charge number three, which the defendant considered very important to him. This despite the fact that the Court had previously granted the motion.

Rule 30 of the Federal Rules of Criminal Procedure provides as follows:

> *At the close of the evidence or at such earlier time*

during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

As amended Feb. 28, 1966, eff. July 1, 1966. [p. 240.]

At 312, Section 160 of the annotations to the Rules of Criminal Procedure:

The exact language of requested instructions need not be adopted, but it is enough that they are or have already been given in substance. Sugarman v. U.S., 1919, 39 S.Ct. 191, 249 U.S. 182, 63 L.Ed.550...U.S. v. Gaydos, C.A.N.Y. 1962, 310 F.2d 883; ...U.S. v. Rheams, C.A. N.Y. 1958, 257 F.2d 842...U.S. v. Kushner, C.C.A.N.Y. 1943, 135F.2d 668, certiorari denied 63 S.Ct. 1449, 320 U.S. 212, 87 L.Ed. 1850, rehearing denied 64 S.Ct. 32, 320 U.S. 808, 88 L.Ed. 488.... [pp. 312-313]

Furthermore, it is the law that although that

Although defendant cannot complain of the court's refusal to charge exactly as he requests, he may justifiably complain when the court refuses to charge the correct law expressly, and thereby relies upon jury's ability to infer it, but if the inference is plain and if no objection is made there may be no error. U.S. v. DiDonato, C.A. N.Y. 1962, 301 F.2d 383, certiorari denied 82 S.Ct. 1557, 370 U.S. 917, 8 L.Ed.2d 497. [p.314] [annotations to the Rules of Criminal Procedure]

Since Pannirello and Provitera were, in effect, the only individuals who testified against Al Green, this failure on the part of the Court to make this instruction to the jury was fatal to the defendant, Al Green, and more particularly so, since evidence of multiple conspiracies were allowed into the record.

POINT III

THE TRIAL COURT ERRED IN ALLOWING THE ATTORNEY FOR WARREN ROBINSON, IVAN FISHER, ESQ., TO PARTICIPATE IN JURY SELECTION FROM JANUARY 29, 1976 UNTIL HE WAS SEVERED ON FEBRUARY 4, 1976.

Rule 24 of the Rules of Criminal Procedure provides as follows:

> *(a) Examination. The Court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.*
>
> *(b) Peremptory Challenges. If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not*

more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(c) Alternate Jurors. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

As amended Feb. 28, 1966, eff. July 1, 1966. [pp. 109-110]

The defense was allowed sixteen peremptory challenges, but these challenges were for both the panel of twelve and the alternates. There was confusion as to this point, as witness the objection of Eleanor Jackson Piel, who represented Rufus Wesley [see App. JA 365-368, trial minutes, pp 268-71].Mrs. Piel's objection was that she believed the sixteen peremptory challenges did not include the

alternates, as the statute allows two peremptory challenges when four alternates are chosen (see Rule 24). This would bring the number of peremptory challenges to fourteen that we were allowed.

The selection of jurors occurred by the fourteen lawyers representing the various defendants voting on the sixteen challenges by majority vote. Ivan Fisher, who represented Warren Robinson, was lead counsel at the time. He had made a prior motion for bifurcation of the second count, which had been granted and then, as is indicated in the fact pattern, he told the Court that he intended to open to the jury and indicate that his client was guilty of the charges (see App. JA507, tr., p.29; JA348-350, tr. 71, 72, 74; JA508-23, tr.88-103; JA524-35, tr.200-212).

He then moved for a total severance on January 29, 1976 (see App. JA 536, tr. 287). Motions were made by the various attorneys for a severance, and this motion was joined on behalf of Al Green. The Court took this motion under advisement and did not grant the motion until February 4th, during which time a great deal of the jury selection had occurred. It is the position of Al Green that this was error. The Court realized the Mr. Fisher's opening to the jury was tantamount to an admission of guilt, which would cause irreparable damage to the other defendants. In fact, Robinson should have been severed immediately, prior to the selection of the jury.

Mr. Fisher's role as lead attorney placed him in a position in jury selection where he could sway other counsel. In addition, he was voting challenges. This was error on the part of the Court. Mr. Fisher's client should have been severed immediately, prior to jury selection and his continuing in the role of lead counsel and voting for a jury amounted to error.

POINT IV

THE TRIAL COURT ERRED IN NOT ADVISING DEFENSE COUNSEL AS TO THE REASON JUROR NUMBER THREE WISHED THE TRIAL TO BE PURSUED TO A RAPID CONCLUSION, AND NOT ADVISING TRIAL COUNSEL AS TO THE NOTES SENT TO THE COURT BY THE JUROR.

Juror number three, Mr. Allen, indicated at the outset of the trial that he did not wish to continue with the case beyond mid-March. (See App. JA 179, trial minutes, p. 64.)

The trial, of course, extended beyond that period and, in fact, juror number three sent a note to the Court. Trial counsel requested that the Judge advise us of the contents of the note so that we might determine whether in fact, we had been prejudiced. The Court refused to allow us to see the contents of the note, indicating that the contents were of a personal nature. (App. JA 180-86, tr. 4298-4305)

This constituted error and trial counsel were entitled to know what the secret communications between juror number three

and the Court concerned.

Rule 43 of the Federal Rules of Criminal Procedure requires that the defendant must be present at all stages of the trial.[1]

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[1] *Rule 43. Presence of the Defendant*

(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,

(1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or

(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom.

(c) Presence Not Required. A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defen-

In Dodge v. United States, C.A.N.Y., 1919, 258 F 300, cert. denied, 40 S.Ct. 10 250 U.S. 660, it was held that any communication from the trial Court to jury in a criminal case that was not made in open court is improper. Coupled with that, the Court stated in United States v. Woodner, C.A.N.Y., 1963, 317 F.2d 649, that private conferences between two jurors and the trial judge during the trial was not ground for reversal of conviction, absent a plain showing that prejudice resulted to the defendant. However, it is the contention of Al Green, that unless the communication were known between the Court and juror number three, it would be impossible to determine whether prejudice did result. It is respectfully submitted that this

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dant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

(3) At a conference or argument upon a question of law.

(4) At a reduction of sentence under Rule 35.

As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(35), 89 Stat. 37[illegible]. [p.9]

should be constituted error.

POINT V

THE TRIAL COURT ERRED IN RULING THAT THE IDENTIFICATION IN OPEN COURT OF AL GREEN BY WITNESS HARRY PANNIRELLO WAS, IN FACT, NOT TAINTED BY PHOTOGRAPHS SHOWN THE WITNESS PRIOR TO TRIAL AND ALSO BY THE FACT THAT THE UNITED STATES ATTORNEY REPRESENTED THAT PANNIRELLO HAD NOT BEEN ABLE TO IDENTIFY GREEN WHEN ASKED BY THE UNITED STATES ATTORNEY IF HE SAW GREEN.

Prior to the commencement of Pannirello's direct testimony, the question arose as to in-court identification of several of the defendants, among whom was Al Green. Objection was raised by several of the defense counsel and a request made of the Court for a preliminary hearing out of the hearing of the jury to determine whether the in-court identification of the witness had been tainted by any photographs that he might have been shown prior to trial. The Government then indicated that it was its contention that Mr. Pannirello had not been shown any photographs since his testimony in the Tramunti trial.

Pannirello was then called and commenced testimony. In the midst of his testimony, the Government indicated:

> *MR. ENGEL: Your Honor, I did some checking at lunch. The Government represents that the witness Pannirello has not been shown any photographs of any*

sort subsequent to the trial in United States vs. Tramunti, that is of the defendants on trial.

Last night at my office he was shown a picture of a Bunny Hansen and Butch Pugliese and Hattie Ware, and perhaps one other photo.

In any event, not of the defendants on trial.

As to the situation which pertained prior to that trial and during it, he was obviously shown, as your Honor well knows, several photographs of the defendant Hansen at the trial and these were received in evidence.

In addition, prior to his going to court, in Mr. Phillips' office, he was shown pictures of Hansen, some of which were then received in evidence.

Your Honor declined to receive all of them.

Before that, prior to the grand jury testimony in October of 1973, the witness Pannirello was shown in the nieghborhood of 50 photographs by special AGents [sic] John Nolan and Fred Moore, the Drug Enforcement Administration. These photographs were all, with perhaps a few exceptions, including the exception as to Mr. Salley, photographs in the form of mugshots. Perhaps a few others were not mugshots but, in any event, they were of the same or similar size as mugshots.

From these the witness Pannirello identified the person he knew as Basil, the person he knew as Al Green, and the person he knew as Folks. That is the state of the record. [See App. JA 544-45; tr. 1877-78.]

After several pages of colloquy, [see App. JA545-560, tr. 1878-1893] , Mr. Engel (on p. 1893) was asked whether the various defendants were pointed out to Pannirello. The following colloquy occurred:

MR. SCHWARTZ: Your Honor, aside from what I said, I wonder if the Government would be willing to indicate now that Mr. Pannirello has not pointed out the names of various individuals and where they are sitting in

the courtroom for the purposes of identification.

MR. ENGEL: As a result of the motions, I asked the witness at lunch in my office whether--I said:

"Answer the following questions yes or no."

I asked him whether he saw the defendants, and the witness answered.

I said, "Do you see where they were sitting?"

He told me. He answered that question.

That's all I asked. That's all I asked him That's all he told me.

I wanted to know where in-court identifications would be made; that's all. I didn't indicate in any fashion--

MS. PIEL: Point of information--

MR. ENGEL: Excuse me, Ms. Piel.

THE COURT: Sit down, Ms. Piel.

MR. ENGEL: I didn't indicate in any fashion where anybody was sitting.

I said, "Did you see Hansen or Basil in the courtroom, Al Green in the courtroom, and Folks in the courtroom?"

And he answered, "No."

I asked, "Did you see where he was sitting?"

And he said, "No."

MR. SCHWARTZ: In addition to indicating by Mr. Engel and Mr. Siffert, I would like to know if the witness was pointed out--whether any agent pointed out to him where any defendant was sitting?

MR. ENGEL: I didn't hear you.

MR. SCHWARTZ: I would like to know whether any Government agent, DEA agent, pointed out where any of the defendants were sitting.

MR. ENGEL: No agent was in here, so I think that it would be impossible, and I represent to the Court that no agent did.

THE COURT: Go ahead, Ms. Piel.

MS. PIEL: My only point of information, and I think perhaps you answered it, was that he did identify the defendants that you have named--

MR. ENGEL: What I said and I want to make it perfectly clear, I asked him, "Did you see these three

people in the courtroom, yes or no?", and he answered, "No."

"Did you see where they were sitting; yes or no?"
And he answered, "No."
That is what I asked him. [See App. JA560-62, tr. 1893-95]

A hearing was then held, after which the Court allowed an in-court identification.

Although there was testimony from Pannirello that he had seen Al Green prior to that time on at least five occasions somewhere in 1970-1972, it is the contention of the defendant, Al Green, that there was not ample evidence to establish an independent basis for Pannirello's identification of Al Green and there was a substantial likelihood for misidentification. [Haberstrok v. Montanye, 493 F.2d 483 (2d Cir. 1974); United States v. Counts, 471 F.2d 422, 424-25 (2d Cir.) cert. denied, 411 U.S. 935, 93 S.Ct. 1909 (1973)]

As was stated in Stovall v. Denno, 388 U.S. 304, 87 S. Ct. 1967 (1967), "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrrounding it."

The United States attorney indicated in open court, on the morning Pannirello was testifying, that although the defendants were visible to him, that Pannirello did not see the defendants. How did his perception on the following day become so acute that Pannirello

identified Green, among others, in open Court?

In view of this statement by the United States attorney, Mr. Engel, and not withstanding the cross-examination, in which Pannirello indicated that he had met Al Green on at least five and maybe ten occasions, the Court should not have allowed an in-court identification, because in the totality of circumstances it would appear that there was a taint in his identification. Since Pannirello was one of two witnesses against Al Green, and since Pannirello's brother-in-law, Proietera, could not identify Al Green in open court, Pannirello's identification of Green led, in great measure, to his conviction.

POINT VI

THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL WHEN THE WITNESS PANNIRELLO, AGAINST THE WISHES OF THE COURT, TESTIFIED THAT HE HEARD ON THE RADIO, "THAT THERE WAS A BIG BUST..." (P.2128) IN CONNECTION WITH A MEETING WITH AL GREEN.

During the direct testimony of Pannirello, the following colloquy took place:

> *Q Did there come a time in the spring of 1972, Mr. Pannirello, when you had occasion to be in the vicinity of Yankie [sic] Stadium?*
>
> *A Yes.*
>
> *Q How did that occur? Could you tell us what the background of that was?*

A Yes. The reason for that was myself and Jimmie were making deliveries to 1380 University Avenue and I heard over the radio and in the newspaper--

MR. SCHMUKLER: Objection, your Honor.

THE COURT: You heard something over the radio?

THR [sic] WITNESS: I heard over the radio and I read in the newspaper and I saw it on TV--

MR. SCHMUKLER: Objection, your Honor.

THE COURT: Okay. Don't tell us what you heard on the radio. You heard something on the radio. Right?

THE WITNESS: Right.

THE COURT: Okay.

Go ahead from there.

THE WITNESS: That there was a big bust--

MR. SCHMUKLER: Objection, your Honor.

THE COURT: No, no. Ladies and gentlemen, forget about it. He heard something on the radio.

All right.

Q As the result of that did you have occasion to make a phone call?

A Yes.

Q Who did you call?

A I called Al Green.

Q What did you tell him?

A I said that "We will have to make other arrangements because I am not coming near the building any more."

Q What did he say?

MR. SCHWARTZ: Your Honor, at this time I object. I would appreciate it if we could have a side bar.

THE COURT: Sure.

(At the side bar.)

THE COURT: Go ahead.

MR. SCHWARTZ: I am going to ask for the removal of a juror and a declaration of mistrial which refers to Al Green. This mentioning of a "big bust" and followed by Al Green's name being mentioned I think leads the jury to believe that Al Green was arrested and, therefore, must be implicated, and I would think that it is highly prejudicial to Al Green. For that reason I am asking for the declaration of a mistrial. [See trial minutes, pp.2127-29]

The Court denied the motion for a mistrial and in the absence of a declaration of a mistrial, a request was made of the Court that it ask the jury to expunge from their minds what had been said. The Court replied:

> *THE COURT: Ladies and gentlemen, you got to understand something. When I suggest to you that a matter should be stricken from your mind, I want you to ignore it. Take out that little mental eraser and ignore it.*
>
> *Let me go one step further. Whatever I am asking you to forget about has nothing whatsoever to do with these defendants on trial, nothing at all. [See trial minutes, pp 2130-31]*

This statement of the witness over the Court's prior instruction, was an obvious intention on the witness's part to get inflammatory material before the jury. In the jury's mind, moreover, it must have appeared that there was an arrest of such infamous notoriety that it was heard on the radio, and appeared in the newspaper and on television and concerned Al Green. This was not the case, however, but it is our contention that the Judge's instructions to the jury could not cure this fault and in view of its obvious prejudice to the defendant, Al Green, and its being given contrary to the instruction of the Court, the defendant should be accorded a new trial.

POINT VII

THE INTRODUCTION OF LACTOSE INTO THE TRIAL, DURING THE PRESENTATION OF TESTIMONY AGAINST WALTER JOHN SMITH AND THE INTRODUCTION OF

HEROIN, WHICH WAS FOUND IN THE APARTMENT OF BASIL HANSEN, CONSTITUTED INFLAMMATORY MATERIAL WHICH WAS HIGHLY PREJUDICIAL TO THE DEFENDANT, AL GREEN, AND CONSTITUTED ERROR.

The trial Court allowed into the record testimony (1) as to lactose which was found in the Roger's Surgical Supply Company and (2) heroin, which was found in a search in October of 1973 of Basil Hansen's apartment (see App. JA 414-18, tr. pp. 2573-86)

Basil Hansen, aside from the theory that he is connected in the conspiracy with Al Green, had no dealings with Green and there was no testimony whatever that the two were in any way connected. Despite this fact, the heroin that was found in a search made of Basil Hansen's apartment was allowed into the trial. This proved so inflammatory as to prejudice Al Green and to require a new trial. The jury saw narcotic paraphernalia and heroin itself, which was connected, at best, to a further conspiracy of which Al Green was not a part, and which was extremely prejudicial to Al Green and in light of the Bermudez case, 526 F.2d 89 (1975), the evidence was too prejudicial to be admitted in view of the slight probative impact. See United States v. Papadakis, 510 F.2d 287, 294-95 (2d Cir.) cert. denied, 421 U.S. 950, 95 S.Ct. 1682; see also United States v. Falley,

489 F.2d 33, which held that the introduction of physical evidence outweighed the probative value of the matter.

FURTHER

The defendant, Al Green, adopts the arguments of co-appellants as his own on the law.

CONCLUSION

The judgment of conviction of the defendant, Al Green, should be reversed and the indictment dismissed.

Dated: Brooklyn, New York
September 2, 1976

Respectfully submitted,

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